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IN THE

Supreme Court of the United States

October Term, 1955

No. 329

FAY HEASLEY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

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1. The Government argues that many of Petitioner's contentions were not raised at the trial and therefore should not be considered now (Br. in Opp., pp. 8-9, 13, 14). But the trial of this case was held well before this Court rendered its decisions in the net worth cases and, consequently, objections based upon those decisions at the trial were impossible.[1] Moreover, when subsequent to the issuance of the net worth decisions,

[1] Since the briefs and argument in the Eighth Circuit Court of Appeals also preceded the date of the net worth decisions, arguments based upon those decisions could not be made to that Court. But on reargument before the Court of Appeals, all of these objections were clearly raised. See p. 2, *infra*.

this Court remanded ten cases then pending on certiorari "to their respective Courts of Appeals for consideration in the light of" the "principles laid down in the net worth decisions,"[2] it was made manifestly clear that this Court was not willing to permit an accident of chronology to deprive defendants in criminal cases of the important safeguards established by this Court for their protection.

In any event, the arguments presented by Petitioner in the Petition were clearly raised to the Eighth Circuit Court of Appeals on rehearing; and, in denying the rehearing (App. 13), that Court clearly passed upon them.[3] And, since it is the decisions of that Court upon which review is being sought, the questions presented, having been expressly passed upon by the Court below, are now appropriately before this Court.

2. The Government suggests that, because it did not rely solely upon the net worth method in this case and because there may have been so-called direct proof of tax evasion, the principles established by this Court's recent net worth decisions "are at most of secondary importance". (Br. in Opp., p. 8). But whether or

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[2] *Mitchell* v. *United States*, *Goldbaum* v. *United States*, *Banks* v. *United States*, *McFee* v. *United States*, *Brown* v. *United States*, *Watts* v. *United States*, *Beaty* v. *United States*, *Strauch* v. *United States*, and *Burdick* v. *United States*, all reported at 348 U. S. 905; and *Remmer* v. *United States*, 348 U. S. 904.

[3] The Court below, in denying rehearing, held:

"• • • after re-examination of the situation in the light of the 'net worth' decisions of the Supreme Court and after briefs thereon being submitted by both parties, the Court is convinced that the result reached in the previous opinion, 218 F. 2d 86, was right and is entitled to stand • • •." (App. 13).

not there may have been such so-called direct proof, the Government is not excused *with regard to the net worth portion of its case,* from following the rules laid down by this Court for the use of the net worth method.

The jury's verdict in this case was based, so far as we can now tell, upon *all* the evidence at the trial, and we cannot assume that in its deliberations it segregated the net worth proof from the other proof in the case. Similarly, it must be assumed, that the jury considered the evidence in accordance with *all* of the trial judge's instructions, not only those of his instructions which did not deal with net worth. So, if there was error with regard to the net worth evidence or the net worth portion of the charge, who can now say that these errors were not prejudicial to the Petitioner? As the Second Circuit noted under similar circumstances in *United States* v. *Altruda,* 224 F.2d 935, 944: "errors which might otherwise have been disregarded as not affecting the substantial rights of the defendant, here, because of the nature of the prosecution's proof and the exhibits may not be overlooked." And this is also the rule which this Court laid down in *Kotteakos* v. *United States,* 328 U.S. 750, 765:

> "if one cannot say with fair assurance, after pondering all that happened, without stripping the erroneous action from the whole, the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

3. In our Petition, at pp. 8-11, we point out that the trial judge charged that Petitioner's opening net worth must be "satisfactorily established", whereas this Court has required that this crucial figure be

proved "with reasonable certainty". We claim that the difference between the instruction given by the trial judge in this case and the rule laid down by this Court amounts to prejudicial error.

The Government has replied by characterizing the difference as "a semantic quibble" (Br. in Opp., p. 10).

If the difference between "satisfactorily established" and "established with reasonable certainty" is a difference in semantics, it is a semantic difference of the highest possible importance, for it could have meant the difference in this case between conviction and acquittal. Indeed, the difference between "satisfactorily established" and "established with reasonable certainty" is as critical as the difference between "beyond a reasonable doubt" and "by a preponderance of the evidence"; and confusion in a charge between the latter two standards—whether a semantic quibble or not—necessarily requires reversal. See *United States* v. *Crescent-Kelvan Co.*, 164 F.2d 582, 588 (C.A. 3, 1948), where even a trial judge's effort, at the suggestion of the prosecuting attorney, to correct the confusion of these standards in his charge was held to be insufficient, and the convictions were reversed.

Apparently recognizing that Petitioner's argument was in fact more than "a semantic quibble", the Government seeks to avoid the consequences of the trial judge's error by countering that the jury was "amply instructed on the requirement of proof beyond a reasonable doubt" (Br. in Opp., p. 10).

Of course, if the jury had not been amply instructed on the requirement on proof beyond a reasonable doubt, that in and of itself would have required re-

versal. However that may be, the portion of the charge in which the instruction concerning reasonable doubt was contained (R. 33) was not directed to a discussion of opening net worth but was part of the trial judge's general instructions. As such, it could not cure an error made in the net worth portion of the charge, for this Court has expressly admonished that charges in cases involving net worth proof must go beyond "formal instructions" if justice is to be done. *Holland* v. *United States,* 348 U.S. 121, 129.

In this case, the portion of the trial judge's charge on reasonable doubt was in thoroughly general terms and was not pointed towards net worth, and therefore could not by any stretch of the imagination satisfy this Court's requirements relating to the establishment of opening net worth. The net worth decisions stress "the importance of accuracy in this figure" because it is "vital to the Government's case"; and hold that the establishment of an opening net worth "with reasonable certainty" is an "essential condition" in this type of case. *Holland* v. *United States,* 348 U.S. at 132. The trial judge here not only failed to make the establishment of opening net worth with reasonable certainty an essential condition, but instead instructed the jury that the opening net worth figure need only be "satisfactorily established". In so doing, we submit, the trial judge violated one of the cardinal principles promulgated by this Court; and the Government's attempt to characterize this error as one of "semantics" or to attenuate its effect by relying upon another portion of the charge should not now be permitted to becloud this prejudicial error.

4. The Government argues that because a Government agent testified that Petitioner furnished most of

the figures in the opening net worth statement that statement "supplied the best possible source of information as to his opening net worth." (Brief in Opp., page 9). But the Government fails to mention that Petitioner, at the trial, flatly denied having signed the opening net worth statement (T. 445-7).[4] Nor does the Government make any mention of the fact that the opening net worth statement—upon which the correctness of its entire net worth case necessarily depended—contained a basic error which the Government itself must have known. According to the statement, Petitioner had as of January 1, 1944 only $500.00 in liabilities. But in 1950, at the very time that Petitioner allegedly had signed the statement there was pending against him a claim by the United States for certain seed loans for an amount in excess of $1,700 (T. 449, 450); and the very United States attorney who was handling the seed loans' claim against Petitioner was prosecuting him in the instant case (T. 450-1).[5] It therefore comes with little grace for the Government to say at this late date that the only weaknesses in the opening net worth statement resulted from weaknesses in Petitioner's memory (Brief in Opp., page 9). The memories of the Government's attorneys seem at least equally at fault.

Under any circumstances, the Government's argument on the opening net worth statement—as with its

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[4] Petitioner acknowledged the signature on the statement to be his, but claimed that he had only signed a receipt for certain checks which had been returned to him (T. 447). Petitioner also denied that he had given the Government agent the information contained in the statement (T. 446-7).

[5] Reference to this error is not made for the purpose of refuting specific amounts in the Government's net worth case. We raise it here, for the same reason that it was raised at the trial, "to show the inaccuracy of Exhibit 11" (T. 454).

arguments on the other points raised in the Petition —stray far from the mark and obscure rather than meet the central issue. For the fact of the matter remains that this Court has clearly held that an extra-judicial statement of a defendant may not be used to establish his opening net worth unless there is independent evidence to support it, *Smith* v. *United States,* 348 U.S. 147, and in this case, there was no such independent corroborative evidence to support the opening net worth statement, which was questioned not only with regard to its accuracy, but also with regard to its authenticity.[6]

5. In the Petition, we present a question as to whether the necessary element of willfulness—which this Court has held must be proved by independent evidence—was made out in this case (Pet., p. 4). We there point out that Petitioner had at best a grade school education, was unable to cope with accounting or the requirements of the revenue laws, and in consequence turned over all the records he had to an accountant, upon whom he placed total and complete reliance for the preparation of his income tax returns. He signed his returns in advance in blank and the accountant "filled them out after I was gone". See generally Petition, pp. 21-24.

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[6] We recognize that whether the opening net worth statement was Petitioner's, as the Government urged, or whether it was not, as Petitioner claimed, was a question to be determined by the jury. We raise the point here, however, because it particularly illustrates the need for and the importance of this Court's rule that opening net worth may not be based upon a defendant's extra-judicial statement alone, but must be corroborated by independent evidence. This rule would seem to be *a fortiori* applicable where there is a dispute as to the authenticity of a defendant's extra-judicial statement.

The Government contends that the question thus presented is insubstantial. The question of willfulness, according to the Government, was a straight jury issue and it was for the jury to evaluate the Petitioner's testimony, observing him and passing judgment on his credibility. (Br. in Opp., p. 14)

But the Government's argument does not reach the question of whether there could be a finding of willfulness in the circumstances of this case. "Willful" this Court has reminded "is a word of many meanings, its construction often being influenced by its context." *Spies* v. *United States,* 317 U.S. 492, 497. The Government suggests only that the jury could infer willfulness "in view of the great size of the understated income over a three-year period" and from "Petitioner's shifting and questionable explanation for the disappearance of his records." (Br. in Opp., p. 14)

Thus, the Government again argues directly in the face of this Court's holdings in the net worth decisions. In the *Holland* case, it was expressly held that willfulness "cannot be inferred from the mere understatement of income". 348 U.S. at 139. So that with regard to the Government's first point, i.e., that willfulness could have been found by the jury in this case from the "understated income over a three-year period", the Government is in plain error.

The Government is similarly in error with regard to the so-called "shifting and questionable explanation for the disappearance of [Petitioner's] records". In the first place Petitioner's explanation for the disappearance of his records did not "shift". Petitioner stated, both according to the testimony of the Government investigator (T. 15) and in his own testimony (T. 480), that they had been kept in a pasteboard box in the attic of his farm and had been destroyed by rats and mice. Nor is this explanation a "question-

able" one, for the problem of rats and mice on farms is recognized, widespread, and serious. Perhaps, if Petitioner were a banker with offices in a fine building in a large metropolitan city, his explanation would be "questionable". But Petitioner, it must not be forgotten, is a farmer in a rural area in North Dakota.

Moreover, the great reliance placed upon the absence of Petitioner's records by the Government to support the finding of willfulness in this case is all the more extraordinary in view of the fact that those whose income "arises solely from the business of growing and selling products of the soil" are expressly exempted from keeping records *Treas. Reg. 118, § 39.54-1,* pursuant to § 54, *Internal Revenue Code of 1939;* and Petitioner plainly falls within this exemption. Citation of and reliance upon *Spies* v. *United States,* 317 U.S. 492, 499 (Br. in Opp., p. 14) is completely inapposite to the circumstances of this case. Because Petitioner may have kept records which he was not required by law to do, and because he was unable to produce them, the Government has sought to impute "wilfulness," even though no such imputation could be made if Petitioner had kept no records at all.

6. Subsequent to the filing of our Petition, the decision of the Second Circuit in *United States* v. *Altruda,* 224 F. 2d 935 (CA 2, 1955) was reported. The *Altruda* case, in which a tax evasion conviction was reversed, contained many of the factors present in the instant case. Altruda, like Petitioner, had not kept books of account[7] and his records had been destroyed either by fire or by a flood in his basement. The Government there also relied upon the defendant's uncor-

[7] Since Altruda derived his income from the practice of medicine and from investments in securities and real estate, he was required by law to maintain records, whereas Petitioner, a farmer, was exempted from this requirement.

roborated extra-judicial statement to establish opening net worth. Also, the Government introduced in evidence several accounting schedules, similar to those introduced in this case—which were aptly characterized as "a mass of figures", 224 F. 2d at 938—in order "to assist the jury in understanding and considering the evidence." *Id.* at 939; *cf.* T. 313.

In the *Altruda* case, as in this case, a basic net worth summarization contained omissions or inaccuracies which "served to make that exhibit incomplete, inaccurate and misleading". *Compare* 224 F. 2d at 942 *with* Pet., pp. 12-15. There, as here, the "charge of the Court gave to the jury but little guidance as to the interpretation to be placed on the schedules which were introduced in evidence by the Government. It explained none of the calculations shown." *Compare* 224 F. 2d at 943, *with* Pet., pp. 15-16.

But unlike the Eighth Circuit here, the Second Circuit in the *Altruda* case followed this Court's admonition in *Holland* v. *United States,* 348 U.S. at 129, that "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation". In reversing Altruda's conviction, the Second Circuit stressed that:

> (1) "it would take a jury of mathematicians to ascertain the facts out of the confusion created by these schedules" 224 F. 2d at 938-9;
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> (2) "these Government prepared schedules * * * have a way of acquiring an existence of their own, independent of the evidence which gave rise to them' " 224 F. 2d at 939;
>
> (3) the Government's net worth summarization was inconsistent with many of the facts known to the Government, 224 F. 2d at 942; and

(4) "The charge of the Court gave * * * little guidance as to the interpretation to be placed on the schedules" and "explained none of the calculations" and therefore "did not meet the requirements of a net worth prosecution." 224 F. 2d at 943.

The similarity between *Altruda* and this case is immediately and obviously apparent. If the references to sources and figures of income were changed, the *Altruda* decision would be on all fours with the net worth case against Petitioner. And, we submit, if a detailed analysis like that made by the Second Circuit Court of Appeals in *Altruda* had been made by the Eighth Circuit of the net worth case against Petitioner, the conclusion reached in *Altruda* would necessarily be applicable: "that errors which might otherwise have been disregarded as not affecting the substantial rights of the defendant, here, because of the nature of the prosecution's proof and the exhibits may not be overlooked." 224 F. 2d at 944.

* * *

As the Petition and this Reply Brief indicate, Petitioner has been deprived of the protection and safeguards established by this Court for defendants in net worth cases. A looser and incorrect standard for proving Petitioner's opening net worth, less exacting than that required by this Court, was used in this case (Pet. p. 11). Petitioner's extra-judicial statement, inaccurate and questioned as to its authenticity, was relied upon for the establishment of opening net worth, without independent evidence to support it (Pet., p. 9). Though there were obviously omissions, inaccuries, and ambiguities in the Government's net worth

summarization, it was permitted to go to the jury without any "guarding instructions" (Pet., pp. 12-16). The jury was not adequately instructed with regard to the net worth method (Pet., pp. 17-18). An improper reference was made to Petitioner's returns for non-prosecution years, in our mind, sufficient in and of itself, to require reversal (Pet., pp. 19-20). And finally, the circumstances of this case raise, we believe serious questions as to whether the necessary element of willfulness could have been found to exist, in view of the Petitioner's background, his complete reliance upon an accountant, and the absence of independent evidence heretofore held essential to support criminal culpability (Pet., pp. 21-24).

CONCLUSION

For the foregoing reasons, and those contained in the Petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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